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Siaw Kim Seong v Siew Swee Yin (f) & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02–181 OF 2005
GOPAL SRI RAM, MOHD GHAZALI AND TENGKU BAHARUDIN SHAH JJCA
26 MAY 2008

C

Civil Procedure — Pleadings — Issue not pleaded — Locus standi — Whether trial judge bound to decide case on issues on record

D

Land Law — Indefeasibility of title and interests — Transfer — Instrument of transfer — Whether forged instrument

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The plaintiff entered into an agreement with one Chung Soo Chong under the terms of which Chung was to surrender his land to the state authority to resettle the plaintiff, who was to give up his land held under temporary occupation licence in Chung's favour. Pursuant to the agreement the plaintiff applied to the state authority to issue him a title to the land, the subject matter of the dispute, and gave the second defendant's address as his own as

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he had moved out to Kuala Lumpur. Subsequently the plaintiff discovered that the land had been alienated to him but it was registered in the joint names of the defendants pursuant to a memorandum of transfer that had purportedly been executed by the plaintiff in their favour. The plaintiff contended that he had never signed the instrument of dealing and the

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signature of the transferor on the memorandum was therefore a forgery. The defendants, on the other hand, raised the issues that the plaintiff was a mere trustee of the subject property for the defendants and that the plaintiff had indeed signed the memorandum of transfer. The trial judge found that the plaintiff had no locus standi to bring the action and accepted the defendants'

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evidence that the plaintiff had indeed executed the disputed instrument of transfer. Hence this appeal.

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Held, allowing the appeal with costs here and in the court below:

(1) It was never the defendants' pleaded case that the plaintiff had no standing to sue and the point was therefore clearly not on the record of the court. It was the duty of the learned judge to decide the case on the pleadings before him and the learned judge had clearly failed to adhere

to the rule and had therefore erred in dismissing the plaintiff's claim (see para 4); *Haji Mohamed Dom v Sakiman* [1956] MLJ 45 followed.

(2) In the present case, the judge ought to have acted on the totality of the evidence relating to the issue of forgery and compared the signatures. Had he done so, he would — as any reasonable tribunal similarly circumstanced would — have come to the conclusion that the instrument of transfer was a forgery (see para 7).

(3) The learned judge also had not subjected the second defendant's evidence to critical analysis before accepting it, having faced with a divergence of evidence within the defendants' case upon a matter of critical importance. Instead, he turned an indulgent eye upon it and it was therefore clear that the learned judge had plainly failed to judicially appreciate the evidence before him and to draw reasonable inferences that it fairly admitted (see para 8).

(4) In the circumstances, the findings made by the learned judge on the issue of forgery clearly could not stand. The legal consequence of the instrument of transfer being a forgery is that it was null and void and of no effect (see para 9).

[Bahasa Malaysia summary

Plaintif memasuki satu perjanjian dengan Chung Soo Chong di bawah terma yang mana Chung sepatutnya menyerahkan tanahnya kepada pihak berkuasa negeri untuk menempatkan semula plaintif yang akan menyerahkan tanahnya yang dipegang di bawah lesen menduduki sementara kepada Chung. Berikutan perjanjian tersebut plaintif memohon kepada pihak berkuasa negeri untuk memberikannya hak milik tanah tersebut, yang menjadi perkara pertikaian, dan memberikan alamat defendan kedua sebagai alamatnya kerana dia telah berpindah ke Kuala Lumpur. Kemudian plaintif mendapat tahu bahawa tanah tersebut telah diberikan kepadanya tetapi ia telah didaftarkan atas nama bersama defendan-defendan menurut memorandum pindah milik yang dikatakan telah ditandatangani oleh plaintif untuk mereka. Plaintif mendakwa bahawa dia tidak pernah menandatangani surat cara urusan dan tandatangan pemberi pindah milik di dalam memorandum tersebut, oleh itu, adalah pemalsuan. Plaintif, sebaliknya, membangkitkan isu bahawa plaintif adalah hanya pemegang amanah hartanah tersebut untuk defendan-defendan dan bahawa plaintif sememangnya telah menandatangani memorandum pindah milik. Hakim bicara mendapati bahawa plaintif tidak mempunyai locus standi untuk memulakan tindakan dan menerima keterangan defendan-defendan bahawa plaintif sememangnya telah menandatangani surat cara pindah milik yang dipertikaikan. Maka rayuan ini.

Diputuskan, membenarkan rayuan dengan kos di sini dan di Mahkamah Tinggi:

(1) Ia bukan kes defendan-defendan yang diplid bahawa plaintif tidak mempunyai kapasiti untuk menyaman dan perkara tersebut jelas bukan di dalam rekod mahkamah. Ia adalah tugas hakim bicara yang bijaksana untuk memutuskan kes berdasarkan pliding di hadapannya dan hakim yang bijaksana jelas gagal untuk menuruti peraturan tersebut dan oleh itu terkhilaf dalam menolak tuntutan plaintif (lihat perenggan 4); *Haji Mohamed Dom v Sakiman* [1956] MLJ 45 diikut.

(2) Di dalam kes ini, hakim sepatutnya bertindak atas keseluruhan keterangan berkaitan dengan isu pemalsuan dan membuat perbandingan tandatangan-tandatangan tersebut. Jika beliau berbuat demikian, beliau akan — seperti mana-mana tribunal yang munasabah dalam keadaan yang serupa akan — membuat kesimpulan bahawa surat cara pindah milik adalah suatu pemalsuan (lihat perenggan 7).

(3) Hakim yang bijaksana juga tidak menjadikan keterangan defendan kedua tertakluk kepada analisa yang teliti sebelum menerimanya, walaupun berhadapan dengan keterangan yang berbeza dalam kes defendan-defendan atas perkara yang paling penting. Sebaliknya, beliau tidak mengendahkannya dan oleh itu jelas bahawa hakim yang bijaksana telah gagal untuk menghargai keterangan di hadapannya secara undang-undang dan untuk membuat inferens yang munasabah yang boleh diterima secara adil (lihat perenggan 8).

(4) Dalam keadaan tersebut, penemuan yang dibuat oleh hakim yang bijaksana atas isu pemalsuan jelas tidak boleh diterima. Akibat dari segi undang-undang berkenaan dengan surat cara pindah milik yang dipalsukan adalah bahawa ia adalah batal dan tidak sah dan tidak mempunyai kesan (lihat perenggan 9).]

Notes

For cases on indefeasibility of title and interests, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2999–3000.

For cases on issues not pleaded, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5447–5451.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241, FC (distd)

Haji Mohamed Dom v Sakiman [1956] MLJ 45, CA (folld)

Kreditbank Cassel GMBH v Schenkers Ltd [1927] 1 KB 826, CA (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

PP v Mohamed Kassim bin Yatim [1977] 1 MLJ 64, HC (distd) A
Satish Jayantilal Shah v Pankaj Mashruwala [1996] Cri LJ 3099 (refd)

Legislation referred to
Evidence Act 1950 s 73(1)

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Appeal from: Suit No 22–55 of 1995 (High Court, Seremban)

Teng Chang Kim (Cheng Chang Chai with him) (Aqmar, Ng & Associates) for the appellant. C
Bernard Poi (Poi Tzse Meng & Co) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

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[1] This appeal is directed against the order of the High Court dismissing the appellant's (the plaintiff in the court below) claim against the respondents (the defendants in the court below) for specific relief relating to a piece of land. The history of this litigation is as follows.

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[2] At all material times the plaintiff was the holder of a piece of land held under temporary occupation licence ('TOL') No 1488. On 25 May 1972 he entered into an agreement with one Chung Soo Chong of Lee Hing Loong Mining Enterprise Sdn Bhd under the terms of which Chung was to surrender his land to the state authority to resettle the plaintiff and other occupants on another piece of land identified by Chung. The plaintiff was to give up his TOL in Chung's favour and move to the resettled land. Each settler, including the plaintiff was to receive a title to a separate lot to be issued by the state. The plaintiff's case in the court below was that pursuant to the aforesaid agreement he applied to the state authority to issue to him a title to the land that now forms the subject matter of the dispute. In his application, the plaintiff gave the second defendant's address as his own because he had by this time moved out to Kuala Lumpur. Having heard nothing for some time, the plaintiff asked the defendants about the status of his application. This seems fairly reasonable because all correspondence from the relevant department would be received by the second defendant. In March 1993, the plaintiff discovered (as a result of a letter from revenue) that the land in question had been alienated to him. Upon making inquiries, the plaintiff discovered that the subject property (held under HS(M) Lis 7, No PT 69, Plot 12, in the Mukim Pantai, Negeri Sembilan had become registered in the joint names of the defendants pursuant to a memorandum of transfer that had purportedly been executed by the plaintiff in their favour. The consideration disclosed in the memorandum was said to be RM2,000. According to the plaintiff he had never signed that instrument of dealing and

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A the signature of the transferor on the memorandum was therefore a forgery. The defendants raised two issues in their defence. First, that the plaintiff was a mere trustee of the subject property for the defendants. This averment was based upon an assignment allegedly executed by the plaintiff in the defendants' favour. The plaintiff, however, denied that he had ever executed
B that document. The second defence taken was that the plaintiff had indeed signed the memorandum of transfer. So, on the pleaded case of the parties, these were the two issues that the trial court had to determine.

[3] In finding for the defendants, the learned judge proceeded upon two
C main grounds. First, he found that the plaintiff had no locus standi to bring the action. This finding flies in the face of the defendants' pleaded case in which they admitted that the subject property belonged to the plaintiff until he transferred it to them. Second, he accepted the defendants' evidence that the plaintiff had indeed executed the disputed instrument of transfer.
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[4] Taking the first, we are of the view that the learned judge clearly erred in dismissing the plaintiff's claim on this ground. It was never the defendants' pleaded case that the plaintiff had no standing to sue. Quite the contrary. The point was therefore clearly not on the record of the court. It was the duty of
E the learned judge to decide the case on the pleadings before him. In *Haji Mohamed Dom v Sakiman* [1956] MLJ 45, the only issue on record was whether a sale agreement was a forgery. The judge trying the action held it genuine but went on to refuse the plaintiff specific performance on the ground that it was a loan transaction. On the plaintiff's appeal it was held by
F the Court of Appeal that:

> a judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record ...

G It is quite clear that the learned judge in the present appeal failed to adhere to this rule. If this were the only disclosed error we would set aside his judgment and ordered a retrial. But there is here a reason why a retrial is not called for. And that brings us to the second reason offered by the learned judge for dismissing the claim.
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[5] We accept that the issue whether a document is a forgery is one of fact. In an ordinary case involving findings of fact, we do, as a general rule defer to the opinion formed by the judge who is audio visually advantaged. But where the primary trier of fact has failed to judicially appreciate the evidence
I before him, this court will — indeed it is duty bound to — interfere and correct the error. In this behalf we need do no more than to quote from what we said in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 which was approved by the Federal Court when it went to them on second appeal:

A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[6] In the present instance, we are entirely satisfied that the learned judge was plainly wrong in finding for the defendants in the teeth of evidence that went the other way. We are also satisfied that he did not properly evaluate the totality of the evidence nor draw from it such reasonable inferences that it warranted. To establish his case that the memorandum of transfer was forged, the plaintiff, apart from giving his own evidence, called an expert — a government document examiner — who testified that the instrument was indeed a forgery. In essence what the learned judge did was to reject the expert testimony and accept the evidence of the defendants. In so doing he merely applied what Hashim Yeop A Sani J had said in *Public Prosecutor v Mohamed Kassim bin Yatim* [1977] 1 MLJ 64, namely, that expert evidence especially of handwriting can never be conclusive in a criminal case. But in this case you do not have to be an expert to see for yourself that the signature supposed to be of the plaintiff appearing on the memorandum of transfer and the assignment do not match even upon a cursory visual examination. In fact the signature said to be that of the plaintiff on the assignment is manifestly different from that appearing on the memorandum of transfer. And both signatures are wholly different from the plaintiff's admitted signature appearing on the agreement he had with Chung. In our judgment, the learned judge could have — and on the facts of this case he should have — acted under s 73(1) of the Evidence Act 1950 and made the comparison himself. That section provides:

73(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

[7] Had the judge undertaken such an examination he would have concluded, even without the aid of an expert, that the signatures appearing on the assignment and the transfer were plain and undisguised forgeries. And, in the present instance, he was clearly assisted by the evidence of the expert in coming to a conclusion on this part of the case. As observed by RR Jain J in *Satish Jayantilal Shah v Pankaj Mashruwala* [1996] Cri LJ 3099:

> It is true that the court cannot be an expert and base its conclusions merely on comparison of signatures by itself. But it can definitely compare the signatures in light of other admitted evidence on record. In this case, I have gone through the judgement and nothing can be found that the court by becoming an expert and comparing signatures has arrived at any particular conclusion. The court has not made any observation like an expert's opinion. The court has not at all based its finding on such evidence and, therefore, this contention has also no force in the eyes of law. Under the law the court has power to compare signatures/handwriting, strengthening its finding based on other cogent material and evidence on record. Therefore, there is nothing wrong if handwritings are compared to strength its finding.

So, in the present case, the judge ought to have acted on the totality of the evidence relating to the issue of forgery and then compared the signatures. Had he done so, he would — as any reasonable tribunal similarly circumstanced would — have come to the conclusion that the instrument of transfer was a forgery.

[8] Quite apart from these matters, there is also the evidence of the plaintiff himself that the signature on the instrument of transfer is not his. The learned judge does not appear to have evaluated this evidence sufficiently or at all and given it the weight it deserved, corroborated as it was by the expert evidence and obviously different signatures. Further, he does not appear to have subjected the second defendant's evidence to critical analysis before accepting it. The second defendant was a witness with a purpose to serve. Yet there is nothing in the judge's judgment that addresses this important consideration. Further, he appears to have had no heed to the contradiction of the second defendant's testimony by the defendants' own witness, DW3, an advocate and solicitor upon a material particular. According to the tenor of the second defendant's witness statement DW3 was aware of the existence of the instrument of transfer. Yet, when DW3 came to give evidence he flatly denied any knowledge of this all important document. When faced with such a divergence of evidence within the defendants' case upon a matter of critical importance the learned judge ought to have treated the second defendant's evidence with suspicion and subjected it to the most careful scrutiny. Instead, he turned an indulgent eye upon it. As for the evidence of the other solicitor DW4, it is at best equivocal: for she quite frankly conceded that she could not remember if the parties had executed the instrument of transfer in her presence. From the foregoing discussion it is clear that the learned judge had

plainly failed to judicially appreciate the evidence before him and to draw those reasonable inferences that it fairly admitted.

[9] For the reasons already given, the findings made by the learned judge on the issue of forgery clearly cannot stand. With respect, the learned judge ought to have held that the plaintiff did not sign the impugned memorandum of transfer and that document was therefore a forgery. The legal consequence of the instrument of transfer being a forgery is that it is null and void and of no effect. See, *Kreditbank Cassel GMBH v Schenkers Ltd* [1927] 1 KB 826. By virtue of the decision of the Federal Court in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241, a person acquiring land from a forger may obtain an indefeasible title to it if he or she is a bona fide purchaser. However, the principle established in that case does not apply to the present facts because here it was the defendants themselves who were either the forgers or parties to the forgery. They did not acquire the subject property from a forger. Accordingly, they take no title at all.

[10] The appeal is accordingly allowed. The orders of the court below are hereby set aside. There shall be judgment for the plaintiff in terms of prayers (a), (b), (d) and (e) of his statement of claim. The costs in this court and those incurred in the court below shall be paid by the defendants to the plaintiff. The parties are hereby given general liberty to apply to the High Court for the carriage of the judgment herein entered. The deposit in court shall be refunded to the appellant.

Appellants' appeal allowed with costs here and in the court below.

Reported by M Sivabarathi